notice and to solicit comment thereon when, in its discretion, it is appropriate to do so. Southern points out that there may be instances in which changes in circumstances are so unusual or sweeping as to warrant such an opportunity. Southern is concerned that such a mechanism could be used as a vehicle for specious challenges to ETC status, thereby hindering competition by ETCs. Southern therefore argues that in light of the Commission's existing authority, there is no need for an automatic comment provision.[105]

64. Finally, BellSouth argues that the Commission did not impose a duty to inform the Commission of any material change in facts on the applications the Commission granted before issuing its proposed rules. BellSouth argues that the Commission must impose a similar duty on these ETCs as well.[106] Southern disputes this position, arguing that the plain language of the statute and Commission precedent make clear that the rules implementing Section 34(a)(1) apply only to applications filed after the rules become effective.[107]

c. Discussion

65. Commenters raise several significant points. Accordingly, we take this opportunity to explain what we expect from ETCs and other interested parties in these circumstances.

66. First, we agree with Southern and Cinergy that the term "material change in fact" should not apply to the "brief description of activities" required in rule 1.4002. Rather, we believe a material change in fact has occurred only when, in the ETC's judgment, its activities fall outside of the scope of the criteria for ETC status set forth in Section 34(a)(1). We believe that, if we were to adopt BellSouth's position that any change from the description is a material change, we would discourage holding company diversification into telecommunications or information businesses. In our view, the original determination of ETC status is much like a certificate of incorporation. In the past, states required corporations to file a new certificate each time a corporation deviated even slightly from the enumerated activities set forth in the original certificate. Over time, states came to realize that this requirement was extremely burdensome to both corporations and to state administrators, and acted as a deterrent to economic growth and innovation.[108] In our view, this situation is analogous to a situation when, for example, an ETC states that it will provide "long-line" service in its application, but actually provides local loop functions. We note that to the extent an ETC diversifies beyond the activities listed in its application into non-ETC

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[105] Southern Reply at 9-10.

[106] BellSouth Comments at 14-15.

[107] Southern Reply at 10.

[108] *See generally* Robert C. Clark, CORPORATE LAW at 17-19(1986).

activities, it risks revocation of its ETC status as well as adverse action by the SEC under other provisions of PUHCA.

67. However, we reject Entergy's argument that a material change in circumstances which is only of temporary duration should not necessarily negate ETC status. Similar to the situations described above in section III.B.2, we believe that we should not adopt a rule of general applicability in this proceeding, but rather examine the merits of particular facts on a case-by-case basis. For these reasons, our rules specifically provide that in those situations where there is a question as to a potential material change in circumstances, an ETC must either: (a) apply to the Commission for a new determination of ETC status; (b) file a written explanation with the Commission of why the material change in facts does not affect the ETC's status; or (c) notify the Commission that it no longer seeks to maintain ETC status.

68. Third, we reject BellSouth's argument that the proposed rules should automatically provide for an explicit opportunity for interested persons to comment in connection with any filing in which the ETC asserts that the material changed circumstances do not affect its ETC status. Southern is correct that the Commission has the authority to place matters on public notice and to solicit comment thereon when, in its discretion, it is appropriate to do so. Indeed, the Commission has put out for public notice and comment all of the applications for determination of ETC status filed to date, even though the statute did not require us to do so. Thus, as a general matter, we expect that when ETCs notify us of a potential material change in circumstances, we will ask for public notice and comment. However, we do not believe that it is necessary to require such a process in all situations. In addition, as we stated in the NPRM, to the extent persons other than the ETC applicant inform the Commission of a material change of circumstances, the ETC will be given the opportunity to respond and the Commission will take further action as appropriate.

69. Finally, we note that BellSouth argues that while the Commission did not impose a duty to inform the Commission of any material change in facts on the applications the Commission granted before issuing its proposed rules, the Commission should nonetheless impose a similar duty on these ETCs as well. Southern disputes this position, arguing that the plain language of the statute and Commission precedent make clear that the rules implementing Section 34(a)(1) apply only to applications filed after the rules become effective. As explained below, we believe that we can, and should, impose a continuing duty on *all* ETCs to notify the Commission whenever there is a material change in fact, including those parties who acquired ETC status prior to the adoption of these rules.

70. Section 34(a)(1) states that this Commission "shall promulgate rules implementing the provisions of this paragraph which shall be applicable *to applications* filed under this paragraph after the effective date of such rules." (Emphasis supplied.) We think that the purpose of the limitation in this provision contained in the second part of the sentence was to prevent us from retroactively applying application procedures to previously granted applications, and taking actions adverse to existing ETCs based on new procedural rules. However, we do not believe that this language curtails our authority to act when a person

ceases to be an ETC. Indeed, we do not believe that it would be rational to interpret the statute so as to create two classes of ETCs -- those subject to our on-going rules and those not subject, because their applications were filed before our rules were adopted.

71. This interpretation is consistent with our intent in our earlier holding in *Entergy*, where we rejected arguments, based on the language contained in Section 34(a)(1), that we should condition any proposed ETC determination on that applicant's compliance with the requirements of the implementing rules, even if the determination is made prior to the enactment of those rules.[109] In that case, we simply intended that, to the extent we promulgated final rules in the future, we would not revisit Entergy's applications and retroactively apply any new qualification criteria.

72. Finally, from a practical standpoint, it makes administrative sense for ETCs to have an affirmative duty to inform the Commission of any material change in fact. As noted above, prior to the enactment of the Telecommunications Act of 1996, PUHCA effectively deterred many holding companies from expanding into telecommunications markets. The Act now permits them to do so, but makes quite clear that this is a limited exception -- *i.e.*, they may not engage in any other unrelated business. Accordingly, such a duty ensures that an entity's ETC determination remains in good standing and avoids any potential adverse actions by the SEC.

73. In light of the above, we impose a continuing duty on all entities who have received a determination of ETC status, including those who received such status prior to the adoption of these final rules, to report any potential material change in fact -- regardless of when that determination of ETC status was received. In addition, to the extent applicable, we exercise our independent authority contained in Sections 1, 4(i) and 303(r) of the Communications Act.

3. Additional Reporting Requirements

a. Comments

74. BellSouth argues that the Commission should require ETCs to file reports with the Commission so that the Commission will be able to fulfill its obligations under Sections 401 and 402 of the 1996 Act.[110] In this way, argues BellSouth, the Commission will be able to make informed decisions as to when to forbear and eliminate unnecessary regulation. According to BellSouth, these reports should include objective information concerning the status of the development of ETCs' businesses in order to enable a determination by the Commission as to the state of competition in the relevant market. Such information should

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[109] *See Entergy* at ¶ 31.

[110] 47 U.S.C. §§ 160, 161.

include the status of facilities constructed and utilized by the telecommunications providers (including, for example, the number of miles of fiber laid) and information concerning the customer base, expenses and revenues of the entity.[111]

75. Several commenters oppose BellSouth's proposal.[112] First, they argue that BellSouth's proposal falls beyond the scope of this proceeding, in that it consists of proposals for the imposition of on-going obligations following a determination of ETC status, rather than for the application process. Second, they contend that the suggested reporting requirements are excessive and not authorized by Section 34. According to these commenters, Section 34 provides adequate reporting and disclosure requirements to the FCC, the SEC, and to state agencies to protect consumer welfare.[113]

b. Discussion

76. We do not believe that we should impose any additional reporting requirements beyond those already incorporated in our proposed rules. Under the plain terms of the statute, we have no authority to collect such data in the context of an ETC application proceeding. Rather, the SEC is the agency responsible for collecting the type of data proposed by commenters.[114] Moreover, upon a closer examination, it appears that BellSouth seeks nothing more than to have these new entrants file their business plans, a rule that, if adopted, might inhibit potential entry. Accordingly, as we do not believe that new entrants should be saddled with any additional burdens which could delay entry, we will reject BellSouth's proposal for additional reporting requirements.

4. Effect of Filing

a. The NPRM

77. The proposed rules specify that the Commission must act within 60 days of receipt of an application. Applications that do not meet the requirements of the proposed rule set forth in proposed Section 1.4002 will be rejected. Under the proposed rules, if the Commission does not act within 60 days, the application is deemed to have been granted.

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[111] BellSouth Comments at 8-9; *see also* MCI Reply at 4.

[112] Southern Reply at 11; Cinergy Reply at 6; NEES Reply at 2-3.

[113] *Id.*

[114] *See* PUHCA Section 34(f).

b. Discussion

78. Under the plain terms of Section 34(a)(1), a person applying in good faith for a determination of ETC status is "deemed to be" an ETC until the Commission makes an official determination. We must make this determination within 60 days of receipt of this application. Accordingly, consistent with the terms of the statute, we adopt Rule 1.4004.

III. Conclusion

79. In sum, the rules we adopt today establish a simple, straight-forward and expeditious mechanism to accelerate the entry of public utilities into telecommunications markets. We believe that these rules closely follow Congress's mandate, and are consistent with the pro-competitive, de-regulatory thrust of the Telecommunications Act of 1996.

A. Legal Authority

80. Authority for issuance of this *Notice* is contained in Section 34(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA), as amended by Section 103 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), and Sections 1, 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 303(r).

B. Further Information

81. For further information concerning this proceeding, contact Lawrence J. Spiwak, Competition Division, Office of General Counsel at (202) 418-1870.

C. Regulatory Flexibility Certification

82. The NPRM incorporated an initial regulatory flexibility analysis (IFRA)[115] of the proposed rules. No comments were received in direct response to the IFRA. Section 604 of the Regulatory Flexibility Act, as amended,[116] requires a final regulatory flexibility analysis in a notice and comment rulemaking proceeding unless we certify that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[117] The Regulatory Flexibility Act generally defines the term "small entity" as having the same meaning as "small-business concern" under the Small Business Act,[118] which defines "small-

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[115] 5 U.S.C. § 603.

[116] 5 U.S.C. § 604.

[117] 5 U.S.C. § 605(b).

[118] 5 U.S.C. § 601(3), adopting 15 U.S.C. § 632(a)(1).

business concern" as "one which is independently owned and operated and which is not dominant in its field of operation . . . "[119] and which meets any additional criteria established by the Small Business Administration (SBA).[120] We believe that the rules we adopt today will not have a significant economic impact on a substantial number of small entities.

83. As noted above, the primary purpose of Section 103 is to permit registered public utility holding companies to diversify into telecommunications industries without having to seek prior SEC approval by acquiring or maintaining an interest in an ETC.[121] By permitting such diversification in the 1996 Act, Congress removed a significant (and anomalous) regulatory disparity between registered public utility holding companies (of which there are fifteen) and utilities that are not registered public utility holding companies -- who have always been free to enter the telecommunications industry without prior SEC approval, regardless of their size or scope.[122] Accordingly, the primary reason for any entity -- regardless of size -- to obtain a determination of ETC status is to facilitate a merger or investment by a public utility holding company.

84. As such, in order to facilitate Congress's clear mandate to expedite the entry of public utility holding companies into telecommunications and information services, the rules we adopt today establish a simple, straight-forward and expeditious mechanism consistent with the pro-competitive, de-regulatory thrust of the Telecommunications Act of 1996. Accordingly, the rules adopted here impose, at most, *de minimis* compliance costs on those entities seeking a determination of ETC status. For example, in order to comply with these final rules, prospective applicants need not hire any accountants or engineers to facilitate the filing of an application. Rather, applicants need only provide a brief description of their planned activities, and certify that they satisfy the enumerated criteria and any other applicable Commission regulation.

85. Accordingly, we therefore certify, pursuant to Section 605(b) of the Regulatory Flexibility Act, as amended by the Contract with America Advancement Act of 1996

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[119] 15 U.S.C. § 632(a)(1).

[120] 15 U.S.C. § 632(a)(2).

[121] As noted above, it is the person who seeks a determination of ETC status -- and not the utility holding company -- who files an application. These persons may include small entities. However, we note that of the first fifteen applications for a determination of ETC status received, fourteen were wholly-owned subsidiaries of registered public utility holding companies. These companies are not considered small businesses under the Small Business Act.

[122] *See supra* paras. 2-4.

(CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996),[123] that the rules will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b). The Secretary shall send a copy of this Notice, including this certification and statement, to the Chief Counsel for Advocacy of the SBA.[124] A copy of this certification will also be published in the Federal Register.[125]

D. Ordering Clause

86. In light of the foregoing, the amendments to Part 1 of our rules, as set forth in Appendix A, are ADOPTED, effective 30 days after publication of this order in the Federal Register.[126]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[123] Subtitle II of the CWAAA is the "Small Business Regulatory Enforcement Fairness Act of 1996.

[124] 5 U.S.C. § 605(b).

[125] *Id.*

[126] Approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act has been obtained. (OMB Control No. 3060-0711.)

Appendix A

FINAL RULES

CODE OF FEDERAL REGULATIONS
TITLE 47 -- Telecommunications
Creates New Part 1, Subpart S

EXEMPT TELECOMMUNICATIONS COMPANIES

§ 1.4000 Purpose.

The purpose of part 1, Subpart S, is to implement Section 34(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 *et seq.*, as added by Section 103 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

§ 1.4001 Definitions.

(a) For the purpose of this part, the terms "telecommunications services" and "information services" shall have the same meanings as provided in the Communications Act of 1934, as amended;

(b) Commission shall be defined as the Federal Communications Commission; and

(c) "ETC" shall be defined as an exempt telecommunications company.

§ 1.4002 Contents of Application and Procedure for Filing.

(a) A person seeking status as an exempt telecommunications company (applicant) must file with the Commission with respect to the company or companies which are eligible companies owned or operated by the applicant, and serve on the Securities and Exchange Commission and any affected State commission, the following:

(1) A brief description of the planned activities of the company or companies which are or will be eligible companies owned and/or operated by the applicant;

(2) A sworn statement, by a representative legally authorized to bind the applicant, attesting to any facts or representations presented to demonstrate eligibility for ETC status, including a representation that the applicant is engaged directly, or indirectly, wherever located, through one or more affiliates (as defined in Section 2(a)(11)(B) of the Public Utility Holding Company Act of 1935), and exclusively in the business of providing:

(A) Telecommunications services;

(B) Information services;

(C) Other services or products subject to the jurisdiction of the Commission; or

(D) Products or services that are related or incidental to the provision of a product or service described in paragraph (A), (B), or (C); and

(3) A sworn statement, by a representative legally authorized to bind the applicant, certifying that the applicant satisfies Part 1, Subpart P, of the Commission's regulations, 47 C.F.R. §§ 1.2001, *et seq.*, regarding implementation of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862.

§ 1.4003 Effect of Filing.

A person applying in good faith for a Commission determination of exempt telecommunications company status will be deemed to be an exempt telecommunications company from the date of receipt of the application until the date of Commission action pursuant to § 1.4004.

§ 1.4004 Commission Action.

If the Commission has not issued an order granting or denying an application within 60 days of receipt of the application, the application will be deemed to have been granted as a matter of law.

§ 1.4005 Notification of Commission Action to the Securities and Exchange Commission.

The Secretary of the Commission will notify the Securities and Exchange Commission whenever a person is determined to be an exempt telecommunications company.

§ 1.4006 Procedure for Notifying Commission of Material Change in Facts.

If there is any material change in facts that may affect an ETC's eligibility for ETC status under Section 34(a)(1) of the Public Utility Holding Company Act of 1935, the ETC must, within 30 days of the change in fact, either:

(a) apply to the Commission for a new determination of ETC status;

(b) file a written explanation with the Commission of why the material change in facts does not affect the ETC's status; or

(c) notify the Commission that it no longer seeks to maintain ETC status.

§ 1.4007 Comments.

(a) Any person wishing to be heard concerning an application for ETC status may file comments with the Commission within fifteen (15) days from the release date of a public notice regarding the application, or such other period of time set by the Commission. Any comments must be limited to the adequacy or accuracy of the application.

(b) Any person who files comments with the Commission must also serve copies of all comments on the applicant.

(c) An applicant has seven (7) days to reply to any comments filed regarding the adequacy and accuracy of its application, or such other period of time as set by the Commission. Such reply shall be served on the commenters.

Appendix B
List of Commenters

Comments:

United States Telephone Association (USTA)
Cinergy Corporation
City of New Orleans
Entergy Corporation
Cincinnati Bell Telephone (CBT)
Association for Local Telephone Services (ALTS)
Southwestern Bell Telephone Company
American Communications Services, Inc. (ACSI)
BellSouth Corporation
The Southern Company (Southern)
New Jersey Ratepayer Advocate

Reply Comments:

MCI Telecommunications Corporation
BellSouth Corporation
City of New Orleans
The Southern Company
Entergy Corporation
American Communications Services, Inc.
Massachusetts Electric Company, *et al.*